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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY MICHAEL MENDOZA, Defendant and Appellant.	A153255 (Solano County Super. Ct. No. VCR229274)

Defendant Anthony Mendoza was found guilty of five criminal offenses after he violently assaulted his girlfriend. He contends that one of the convictions (simple assault) must be reversed because it is a lesser included offense of another conviction (injuring a spouse or domestic partner). He also contends that two of the sentences on the three remaining offenses (criminal threat, false imprisonment, and dissuading a witness) should have been stayed under Penal Code section 654. We conclude defendant's arguments lack merit, and we affirm.

EVIDENCE AT TRIAL

In March 2017, K.S. and defendant had been dating for nine months. On the night of March 26 and the early morning of March 27, K.S. and defendant were in a room at a motel in Vallejo. K.S.'s phone went off, and when defendant picked it up, he saw that she had received a message from another man. He got mad and threw the phone at K.S., asking who the message was from and why he was texting her at that hour. When K.S. said she did not know, defendant punched her forcefully on the left side of her face with a closed fist. She started to cry and tried to calm him down, telling him she would tell the

man not to text her. Rather than calming down, however, defendant got angrier, repeatedly punching her with a closed fist.

K.S. got off the bed, and defendant started punching her "everywhere"—her ribs, back, head, neck, and legs. After one of the punches split her lip, defendant yelled at her to wash her face because there was blood on it. K.S. moved to the sink and started washing her face while trying to watch defendant in the mirror so he could not surprise her. He kept yelling and walked away, but then as K.S. was facing the sink, he walked up to her and punched her in the back. When she turned around, he hit her in the stomach, knocking the wind out of her. She fell to the ground, and defendant got on top of her, grabbed her hair, and bashed her head into the ground.

At some point, K.S. climbed onto the bed to get away from defendant, and he pulled her by her hair to the edge of the bed, grabbed her by the neck, and started choking her. He choked her for one or two minutes, during which time she was unable to breathe.

K.S. fell off the bed and onto the floor with defendant's hands still around her neck. He continued choking her while she was on the floor, telling her he should probably just kill her so he could get away with it and not have to go to jail. He told her he would chop off her limbs and spread them everywhere so no one would find her. K.S. was afraid because he had already beaten her up, and she thought he was really going to kill her. At that point, defendant had been attacking her for about 15 minutes, and he continued to tell her he should kill her for about 20 minutes.

Defendant eventually let go and walked across the room, yelling at K.S to be quiet. K.S. tried to be quiet and catch her breath because she was having a hard time breathing. Throughout the attack, she was too afraid to leave because every time she moved towards the door, defendant would grab her, and if she made any noise, the beatings became worse. One time, she ran for the door, but he grabbed her and threw her on the bed.

At some point during the assault, while K.S. was sitting on the bed, defendant stood at the end of the bed with a metal pole in his hand. The pole, which defendant said was a plumber's tool, was approximately two-and-a-half feet long and the same

circumference as a 50-cent piece. Defendant swung the tool at K.S., hitting her right hand when she put her hands up to protect herself. K.S. stood up and defendant caught her in the knee with the tool.

At another point during the assault, defendant heard something outside the motel room. He looked out the peephole and saw police officers outside. He was paranoid they were there because of the fight, and that was when he told K.S. he should kill her. He also threatened that she had better not to go to the police, telling her he would kill her and her family if he went to jail for beating her up.

The entire attack lasted 45 minutes to one hour, defendant finally stopping when he was done, "[l]ike he got his satisfaction or something." He told her to wash her face and that he loved her, and then lay down. K.S. lay down next to him because she was too scared to leave.

The next morning, K.S.'s best friend repeatedly called K.S.'s cell phone because she was concerned. When K.S. finally answered the phone, the friend, who was at the motel, told K.S. to come out. K.S. told defendant her friend would cause a huge scene if she did not go outside, so defendant permitted her to go. When the friend saw the bruises on K.S.'s face, she said, " 'He hit you again, didn't he?' " The friend made K.S. get in the car. She then drove her to K.S.'s mother's home, and the mother drove K.S. to the police station. K.S. told a police officer what had happened and was then transported to the hospital. If not for K.S.'s friend, K.S. probably would not have reported the assault out of fear.

According to K.S., she had a "good ten" "knots" or "lumps" all over her head. She also had bruises on the left side of her face, on her arms and legs, and along her chin and jaw line, and pain in her ribs, neck, and back.

On cross-examination, K.S. denied that she told an acquaintance she was drunk and lied to the police; that she was with a friend rather than defendant on the night of the assault; and that she was trying to get money out of defendant from a settlement he was due to receive. She acknowledged both she and defendant had used methamphetamine

prior to the assault and were under the influence during the assault, but she testified she was not under the influence when she gave her statement to the police.

Vallejo Police Officer Rashad Hollis interviewed K.S. at the hospital. He described her as "shaken, clearly in fear" and seemingly "in a lot of pain." He took photographs that depicted a red, four-inch swelling on the left side of her face, and bruising on both sides of her neck, her right wrist, and her right shin. Her lips were cut, and she had dried blood on her upper lip. K.S. gave Officer Hollis a statement describing what happened during the assault, a statement that was substantively the same as K.S.'s testimony introduced at trial.[1] Officer Hollis did not detect any signs that K.S. was under the influence of a substance.

Approximately one to two hours after Officer Hollis spoke with K.S. at the hospital, he went to the motel and accompanied the manager to the room where K.S. and defendant had been staying. There were two dogs inside the room. Officer Hollis remained in the doorway talking to someone from animal control and was not one of the officers that ultimately entered the room after it had been cleared of the dogs. The police were searching for defendant, but he was not there. Asked at trial if the police were also there to search for evidence, Officer Hollis responded, "Well, mainly we were there looking for [defendant]." He agreed no pipes or tools were taken into evidence that day.

Defendant was arrested two days later at the motel room where the assault took place. The arresting officer did not recall observing any tools like a metal pipe, but he also did not recall even looking around the room since it was not his job to investigate the assault.

K.S.'s mother testified that she believed K.S. was under the influence of methamphetamine on the day of defendant's preliminary hearing. She also testified,

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[1] K.S. testified at defendant's May 2 preliminary hearing. At the time, defendant was in custody, and he and K.S. were no longer in a relationship. On August 17—six days before the start of trial—defendant and K.S. got married. On the first day of trial, K.S. refused to testify, so her testimony was introduced at trial via a transcript of her preliminary hearing testimony.

however, that K.S. functioned "pretty normally" when she was using drugs and she was credible even when she was under the influence of methamphetamine. K.S.'s mother had no reason to doubt that K.S. was telling the truth when she told her about the assault the morning after it happened.

PROCEDURAL BACKGROUND

On May 16, 2017, an information charged defendant with the following five felonies: (1) injuring a spouse or domestic partner (Pen. Code, § 273.5, subd. (a))[2]; (2) assault with a deadly weapon, to wit, a large metal tool (§ 245, subd. (a)(1)); (3) criminal threats (§ 422); (4) false imprisonment (§ 236); and (5) dissuading a witness from reporting a crime (§ 136.1, subd. (b)(1)).

In August 2017, defendant was tried before a jury. It found him guilty of counts 1, 3, 4, and 5, and not guilty of assault with a deadly weapon as charged in count 2 but guilty of the lesser included offense of simple assault.

Defendant was sentenced to an aggregate term of six years two months in state prison, comprised of the four-year upper term on count 1, two months on count 2, and eight months each on counts 3, 4, and 5.

This timely appeal followed.

DISCUSSION

Defendant Was Properly Convicted of Both Injuring a Domestic Partner and Simple Assault

As noted, count 1 charged defendant with injuring a spouse or domestic partner in violation of section 273.5, subdivision (a), while count 2 charged him with assault with a deadly weapon in violation of section 245, subdivision (a)(1). The jury found him guilty as charged in count 1, and not guilty as charged in count 2 but guilty of the lesser included offense of simple assault. Defendant contends the simple assault conviction must be stricken because it is a lesser included offense of injuring a domestic partner.

[2] All statutory references are to the Penal Code.

As defendant correctly argues, a criminal defendant "cannot be convicted of both an offense and a lesser offense necessarily included within that offense, based upon his or her commission of the identical act." (*People v. Sanchez* (2001) 24 Cal.4th 983, 987.) It is also correct that simple assault is a lesser included offense of a section 273.5 domestic violence charge—when the offenses arise out of the same act. (*People v. Gutierrez* (1985) 171 Cal.App.3d 944, 952; *People v. Van Os* (1950) 96 Cal.App.2d 204, 205–206.) Defendant is incorrect, however, that these legal principles preclude his simple assault conviction here because there is substantial evidence that the domestic violence and simple assault offenses arose out of two distinct acts.

In count 1, defendant was found guilty of inflicting injury on someone with whom he had a dating relationship. In support of this charge, there was abundant evidence defendant used his hands to attack K.S.: he punched her in the face at the outset of the assault, punched her "everywhere" on her body, at some point (or points) choked her, and also punched her in her back and stomach while she stood by the sink. The simple assault count, however, arose out of a separate, distinct act: defendant's assault on K.S. with a metal object. Count 2 specifically charged him with "assault . . . with a deadly weapon, to wit, a large metal tool." And K.S. testified that during the assault, she was sitting on the bed when defendant swung a metal tool at her, striking her right hand, which she had raised in front of her face to protect herself. This was substantial evidence that these two offenses arose out of independent criminal acts.

Defendant protests that this result cannot be correct because "[alt]hough the motel room was searched twice, no weapon was found," and the jury acquitted him of assault with a deadly weapon. From this, he infers "the jury found that no such attack occurred." This argument fails for two reasons. First, defendant's statement that no weapon was found despite two searches of the motel room lacks citation to the record. This is not surprising, since the record does not support his claim that the motel room was searched twice. Officer Hollis testified that he went to the hotel one to two hours after the assault, he did not go inside the room where the assault took place, and the police were there looking for defendant. He agreed no pipes or tools were taken into evidence, but he

never testified the room was searched. Similarly, the arresting officer testified that he did not recall even looking around the room when he arrested defendant two days after the assault because it was not his job to investigate the assault; he was there merely to arrest defendant.

Second, defendant erroneously assumes that because the jury acquitted him of assault with a deadly weapon, it necessarily rejected K.S.'s account of him striking her with a metal pole. The jury could simply have concluded that the metal pole was not a deadly weapon. In fact, defendant's trial counsel herself endorsed this theory. At the hearing on jury instructions, defense counsel requested an instruction on simple assault as a lesser included offense of the domestic violence charge. The court agreed, also querying whether a simple assault instruction should be added as a lesser included offense of the assault with a deadly weapon charge. Defense counsel agreed, engaging in this exchange with the court:

"MS. GARCIA: I think they can believe there is no weapon that has been proven beyond a reasonable doubt and it's an assault, so I think it is appropriate, and I am requesting it.

"THE COURT: Yeah. I mean you could be—there can be an assault even with a metal pipe that is not a felony assault, right?

"MS. GARCIA: *It might not be a deadly weapon*.

"THE COURT: That's true, too. There's only a description of it. No photos and the like. They may not agree that it's a deadly weapon." (Italics added.)

Thus, while defendant claims "[t]here is simply no conviction for any assault with a weapon in this case," his counsel's acknowledgment that "It might not be a deadly weapon" defeats his argument. And as there is substantial evidence supporting the convictions for domestic violence and simple assault with a metal pole, the convictions were proper.

Lastly, defendant asserts that the conviction of both domestic violence and the lesser included simple assault offense violated the Fourteenth Amendment prohibition against the deprivation of liberty beyond that authorized by state statute and the Fifth

Amendment prohibition against multiple punishment unauthorized by state law. As the two convictions were not improper, there was no constitutional violation.

The Trial Court Did Not Abuse Its Discretion in Imposing Separate Sentences on Counts 3, 4, and 5

Background

After defendant's trial, the probation department prepared a sentencing report in which it calculated the maximum sentence as four years four months. This was based on count 3 (criminal threats) as the principle term and the sentence on count 5 (dissuading a witness) stayed pursuant to section 654.[3]

At the sentencing hearing, the prosecutor argued the probation report was incorrect and urged the court to impose a six-year sentence. The discrepancy, she explained, was based in part on the dissuading a witness count: "[I]t is the People's argument that that is not 654. I believe [the probation department was] considering it to be 654 to the 422 [criminal threats]." As she explained her position: "[T]here were several statements, several threats that were made. And I think that each of them are distinguishable, and, more importantly, the content of them I think can suggest that some of them are specific to the 136 [dissuading a witness] versus the 422 [criminal threats]. [¶] So if the Court remembers, there were statements of, 'I'm going to kill you,' and also statements that, 'I will cut you up and put your body all around Vallejo if you call the police.' And so I think those two things are very distinguishable, and therefore punishment should be received as to the 136."

Defense counsel disagreed, arguing, "I think that many of these crimes are 654. And I'm asking the Court—this was—this was one ugly incident that he is being convicted for. So I'm asking the Court to put them—to basically treat them as one because the statements of the 422 were in conjunction with the domestic violence. Right? In conjunction with not letting her leave the residence. [¶] So they are all part and parcel of the same incident. Even though they have different elements, they are not

[3] The probation report neglected to include a sentence on the simple assault count.

happening at different times. They are all, as was testified to, as basically one continuous incident. So for that reason I am asking the Court to make them 654."

The trial court concluded that section 654 did not preclude separate sentences for counts 3, 4, and 5, reasoning: "[W]e had a preliminary examination. I heard from the victim, and I made some rulings where I dismissed the attempted murder piece of this. But that's not to say I didn't think it was a very serious domestic violence, that I didn't think it was something that was very much ongoing throughout the night and not something that I would view as 654 in any way, shape, or form." The court went on to then impose the maximum sentence, which it calculated as six years two months, reiterating that section 654 did not apply: "And, again, for the record, and I think the record will support it, this was ongoing criminal acts. Each were independent of the others. They were not 654. There are facts in the record to support that."

Analysis

Defendant renews the position asserted by his counsel at the sentencing hearing, that section 654 precluded separate sentences on counts 3, 4, and 5. He believes this was so because all three counts involved one objective: dissuading K.S. from reporting the assault to the police. As he would have it: "[T]he evidence clearly shows—buttressed by the prosecutor's closing argument—that the intent for the conduct underlying all three counts was to dissuade [K.S.] from reporting the assault. This objective was accomplished by threatening to harm [K.S.] and her family if she reported the attack, and by refusing to allow her to leave the room. The uncontroverted evidence shows that [defendant] looked out of the peephole of the motel room door and saw police outside, and then: [¶] '. . . started to get more annoyed and paranoid that they were there for our fight. And he was telling me—*that's when he started to tell me he wanted to kill me*, that he should kill me. [Citation.] [Defendant] also told [K.S.] that 'if he went to jail for beating me up that . . . he would beat it, get out, and he would kill my family and then kill me.' [Citation.] According to Officer Rashad Hollis, who spoke to [K.S.] at the hospital, [defendant] told [K.S.] that if she reported him to police, he would cut her limbs off and spread them around Vallejo 'to make it hard for us to identify her or catch him.'

[Citation.] Every time [K.S.] would 'go for the door,' [defendant] would grab her. [Citation.] He told her 'you're not going anywhere.' " We reject defendant's argument, as there is substantial evidence supporting the trial court's conclusion that the three offenses merited separate punishment. (*People v. Blake* (1998) 68 Cal.App.4th 509, 512 [court of appeal will affirm the sentence if the trial court's "finding that a defendant harbored a separate intent and objective for each offense . . . is supported by substantial evidence"]; accord, *People v. Osband* (1996) 13 Cal.4th 622, 730–731.)

Section 654, subdivision (a) proscribes multiple punishments for a single, indivisible course of action.[4] (*People v. Hester* (2000) 22 Cal.4th 290, 294; *People v. Miller* (1977) 18 Cal.3d 873, 885.) Where a course of criminal conduct is divisible, giving rise to more than one act within the meaning of section 654, a defendant can be punished for multiple offenses. (*People v. Corpening* (2016) 2 Cal.5th 307, 311.) To determine divisibility, courts must analyze the "intent and objective of the actor." (*Neal v. State of California* (1960) 55 Cal.2d 11, 19; *People v. Corpening*, at p. 311 [if conduct involved more than a single act, we consider whether that course of conduct reflected a single " 'intent and objective' " or multiple intents and objectives]; *People v. Harrison* (1989) 48 Cal.3d 321, 335 ["It is defendant's intent and objective, not the temporal proximity of his offenses, which determine whether the transaction is indivisible."].) If defendant "entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct." (*People v. Beamon* (1973) 8 Cal.3d 625, 639.)

[4] It provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other."

Before applying the above principles to the facts of this case, we make two observations. First, the precise chronology of events during the assault was difficult to ascertain from K.S.'s testimony. Second, both parties rely in part on the statements K.S. made to Officer Hollis, but the trial court instructed the jury it could consider the officer's testimony about K.S.'s statement "only in a limited way": "You may only use it in deciding whether to believe the testimony of [K.S.] that was read here in trial. You may not use that other statement as proof that the information contained in it is true, nor may you use it for any other reason." Subject to those observations, and construing the record in the light most favorable to the judgment (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1052), we conclude the evidence was amenable to an interpretation that supports the trial court's finding that defendant formed a separate intent and objective for counts 3, 4, and 5.

Count 3 charged defendant with making criminal threats in violation of section 422. This offense criminalizes "willfully threaten[ing] to commit a crime which will result in death or great bodily injury to another person" in a manner that "causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety . . . ." (§ 422.) K.S. testified that defendant told her he should kill her, that he should cut off her limbs and spread them around so no one could find her, and that he repeatedly threatened to kill her for approximately 20 minutes. Her testimony did not link those threats to defendant's attempts to prevent her from leaving the hotel room or the appearance of the police outside the room; the trial court could reasonably have understood them to simply be threats to kill K.S. to cause her to fear for her safety.

Defendant urges a different construction of K.S.'s testimony. He construes her testimony as conveying that he *only* threatened to kill K.S. after he heard the police outside the hotel room and thus the threats were thus necessarily intended to prevent her from reporting the assault. This construction is based on K.S.'s testimony when she was describing how defendant became paranoid when he noticed the police outside the room. She testified: "He started to get more annoyed and paranoid that they were there for our fight. And he was telling me—that's when he started to tell me he wanted to kill me, that

he should kill me." As defendant interprets this testimony, K.S. was conveying that this is when defendant began the previously-testified-to 20-minute period of telling her he was going to kill her. But K.S.'s testimony on this point was not definitive. Her testimony was also amenable to an alternative interpretation: that earlier in the assault defendant repeatedly threatened to kill her and dismember her body, and when the police were outside the hotel room, he again told her he should kill her. Under this latter interpretation, endorsed by the trial court, defendant's threat to kill K.S. (supporting the criminal threat charge) was distinct from the threat that he would kill her and her family if she reported the assault (supporting the witness dissuasion charge).

Count 4 charged defendant with false imprisonment in violation of section 236. That section makes it a crime to intentionally and unlawfully restrain, confine, or detain someone by acts or words. (*People v. Riddle* (1987) 189 Cal.App.3d 222, 228.) K.S. testified that during the attack, every time she moved towards the door, defendant would grab her to prevent her from leaving. She described one incident in particular when she ran for the door and he grabbed her and threw her on the bed. It could be inferred from this that defendant intended to prevent K.S. from leaving the room so he could continue his assault on her. While defendant attempts to link this testimony to defendant's threats that he would kill her if she reported the assault, nothing in the record actually links these acts.

Count 5 charged defendant with dissuading a witness from reporting a crime in violation of section 136.1, subdivision (b)(1).[5] K.S. testified that at some point during the attack, defendant heard a noise outside the hotel room and looked out the door's peephole. There were police officers outside, and defendant became paranoid that they were there because of his assault on K.S. According to K.S., defendant then "said that he

[5] That subdivision provides punishment for "every person who attempts to prevent or dissuade another person who has been the victim of a crime or who is witness to a crime from . . . [¶] (1) Making any report of that victimization to any peace officer or state or local law enforcement officer or probation or parole or correctional officer or prosecuting agency or to any judge."

would kill my family. He said that if he went to jail for beating me up that . . . he would beat it, get out, and he would kill my family and then kill me." This was evidence that defendant attempted to dissuade K.S. from reporting the assault by threatening to harm her and her family. And, as already addressed, the trial court's implicit finding that this was distinct from defendant's 20-minute-long threat to kill her finds support in K.S.'s testimony.

In support of his argument, defendant relies on *People v. Smith* (2005) 132 Cal.App.4th 924, which he describes as "very similar" to this case. It is, in fact, dissimilar in critical ways. In *Smith*, as pertinent here, defendant was at the home of his estranged wife. She became concerned for her safety and activated her panic alarm, not realizing the alarm would sound inside the house. At the sound of the alarm, defendant pushed her into the bedroom. After they heard the police at the front door, defendant said he was not ready to go back to jail and threatened to hit her if she screamed or made any noise. When the wife attempted to get away, defendant threatened that if she screamed, he would get a knife and stab her. He pinned her down in the bedroom, covered her mouth to keep her quiet, and told her he would hit her if she moved. The wife ultimately screamed, defendant struck her, and the police intervened. (*Id.* at pp. 928–929.)

In a court trial, defendant was convicted of making criminal threats, false imprisonment, and witness dissuasion, among other things. His sentence included consecutive terms on all three charges. (*Smith, supra*, 132 Cal.App.4th at p. 929.) On appeal, defendant challenged the validity of his waiver of a jury trial and contended the imposition of consecutive sentences violated section 654. (*Id.* at p. 926.)

In its disposition, the Court of Appeal stayed the sentences on the criminal threats and false imprisonment counts and affirmed in all other regards. (*Smith, supra*, 132 Cal.App.4th at p. 937.) Significantly, however, the opinion contains an analysis of only the jury waiver issue. (*Id.* at pp. 932–936.) The analysis concerning the section 654 issue was not certified for publication. (*Id.* at p. 936.) The opinion thus carries no persuasive weight.

Moreover, despite defendant's description of the case as "very similar" to this one, the facts are easily distinguishable. There, all of defendant's conduct that led to the criminal threats, false imprisonment, and witness dissuasion charges occurred after they heard the police at the front door, and his actions and threats were all made in an effort to silence the wife because, as he expressly stated, he did not want to return to jail. (*Smith, supra,* 132 Cal.App.4th at pp. 928–929.) That was not the case here, where defendant's conduct was not all linked to the arrival of the police, nor was it expressly designed to prevent K.S. from alerting them to her plight.

Defendant also asserts that the "judge's decision to deny section 654 relief was clearly based on his incorrect recollection" that the assault lasted the entire night. He bases this argument on the trial court's statement that the assault was "ongoing throughout the night . . . ." This argument fails for three reasons. First, two sentences after the above sentence, the trial court stated, "I view the evidence in this case as having been a continuous or series of criminal acts that went on for quite some time through the night," which was a correct statement of the evidence. Second, the time period in which the various criminal acts occurred is not dispositive, as "[m]ultiple criminal objectives may divide those acts occurring closely together in time." (*People v. Garcia* (2008) 167 Cal.App.4th 1550, 1565.) Third, we see no indication in the record that the trial court based its ruling on an erroneous understanding of the facts.

Lastly, defendant again asserts a constitutional violation claim, specifically, that the consecutive sentences violated "the Fourteenth Amendment prohibition against deprivation of liberty beyond that authorized by state statute" and "the Fifth Amendment prohibition against multiple punishment unauthorized by state law . . . ." There was no sentencing error, and thus no constitutional violation.

DISPOSITION

The judgment of conviction is affirmed.

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Richman, J.

We concur:

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Kline, P. J.

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Miller, J.

People v. Mendoza (A153255)